Nos. 13-17408, 13-17618

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION,

BEST BUY CO., INC.; et al.,

Plaintiffs-Appellees-Cross-Appellants,

v.

HANNSTAR DISPLAY CORPORATION,

Defendant-Appellant-Cross-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

DEFENDANT-APPELLANT-CROSS-APPELLEE'S RESPONSE AND REPLY BRIEF

Yi-Chin Ho
LATHAM & WATKINS LLP
355 South Grand Avenue
Los Angeles, CA 90017
Tel: (213) 485-1234
Fax: (213) 891-8763

Belinda S Lee
Aaron T. Chiu
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111
Tel: (415) 391-0600
Fax: (415) 395-8095

J. Scott Ballenger
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, D.C. 20004
Tel: (202) 637-2200
Fax: (202) 637-2201

Attorneys for Defendant-Appellant-Cross-Appellee HannStar Display Corporation

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellant-Cross-Appellee HannStar Display Corporation, a nongovernmental corporate party, certifies that it has no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The Best Buy Plaintiffs display the weakness of their case by leading with an argument that the district court's judgment can be affirmed on the alternative ground that the Minnesota Antitrust Act applies to purely foreign conduct that even the Sherman Act cannot touch. There is no support for that radical proposition in Minnesota law, and even if there were, it would be preempted by the foreign affairs doctrine and considerations of international comity.

The real issue on appeal is whether the Best Buy Plaintiffs presented sufficient evidence that HannStar engaged in conduct that satisfies the Foreign Trade Antitrust Improvements Act ("FTAIA"). Their brief effectively concedes that there was no such evidence.

The Best Buy Plaintiffs instead rely heavily on this Court's recent decision in *United States v. Hui Hsiung*, 778 F.3d 738 (9th Cir. 2015), which held that the government satisfied the requirements of the FTAIA because it proved that the defendant in that case (AU Optronics) *actually imported* TFT-LCD panels into the United States. The Best Buy Plaintiffs, however, did not introduce similar evidence at their own trial. Instead, they focused all their efforts to prove that HannStar's co-defendant—Toshiba—was a member of the conspiracy, and mistakenly assumed that proof of Toshiba's importation of panels and TFT-LCD finished products would also satisfy the FTAIA's requirements to allow for

recovery from HannStar. This strategy was not only flawed, but it failed. The jury found that Toshiba did not participate in the TFT-LCD panels conspiracy. But even if it did, the Best Buy Plaintiffs would still be unable to recover from HannStar, for the FTAIA looks to the conduct of the *defendant* in determining whether an extraterritorial application of the Sherman Act will allow a plaintiff to recover. Here, the Best Buy Plaintiffs offered no evidence of import transactions *between HannStar and themselves*. The Best Buy Plaintiffs concede as much, admitting that they "did not purchase TFT-LCD panels directly from HannStar." Response Br. 27. They cannot now salvage their failure to satisfy the requirements of the FTAIA by relying on evidence that the government presented against a different defendant in a criminal case but that they failed to introduce at the trial in this matter.

In recent months, the law has become clear that the mere participation in a foreign conspiracy to fix the price of inputs sold to foreign direct customers does not satisfy either the import commerce exclusion or the domestic effects exception of the FTAIA, even when those inputs are incorporated into finished products subsequently sold into the United States. *See Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015). The district court, in entering judgment for the Best Buy Plaintiffs, contradicted established precedent and

authorized a vast expansion of the extraterritorial reach of the Sherman Act—far beyond what Congress contemplated and what the law recognizes.

The Best Buy Plaintiffs also offer no reasonable defense to the district court's entry of judgment notwithstanding their failure to prove individualized injury-in-fact and damages at trial. They instead attempt to rely on inapplicable authority and fault HannStar for not distinguishing between the six different Best Buy entities at trial, when the burden of proving injury and individualized damages rests, at all times, with the plaintiff.

As for their cross-appeal, the Best Buy Plaintiffs offer a strained interpretation of the Minnesota Antitrust Act and two Minnesota Supreme Court cases to argue that the district court erred in permitting HannStar to introduce evidence that the Best Buy Plaintiffs had passed on overcharges on TFT-LCD panels to their customers. The Best Buy Plaintiffs' cross-appeal fails as the Minnesota Antitrust Act clearly permits a pass-on defense: indirect purchasers of price-fixed inputs such as the Best Buy Plaintiffs may recover damages, but courts are expressly permitted to "take any steps necessary to avoid duplicative recovery against a defendant." Minn. Stat. § 325D.57. Neither of the two Minnesota Supreme Court cases argued by the Best Buy Plaintiffs compel a contrary conclusion. Finally, even if the district court had erred on this score, the Best Buy

Plaintiffs' failure to satisfy the requirements of the FTAIA precludes their ability to recover anyway.

The district court erred in denying HannStar judgment as a matter of law. The judgment should be reversed.

STATEMENT OF ADDITIONAL ISSUES ON CROSS-APPEAL

1. Did the district court correctly grant partial summary judgment to permit HannStar to pursue a pass-on defense to the Best Buy Plaintiffs' indirect purchaser damages claims under the Minnesota Antitrust Act?

STATEMENT OF THE CASE ON CROSS-APPEAL

HannStar's Opening Brief details the factual background relevant to HannStar's appeal. *See* Opening Br. 4-18. On cross-appeal, the Best Buy Plaintiffs seek reversal of the district court's grant of partial summary judgment to HannStar allowing it to present the defense that the Best Buy Plaintiffs passed on any overcharges on its indirect purchases of TFT-LCD panels to its own customers.

Defendants' Motion For Partial Summary Judgment On Downstream Pass-On. Before trial, HannStar and the defendants in the other *TFT-LCD* MDL related cases filed a motion for partial summary judgment. They sought an order limiting the damages sought by indirect purchasers of TFT-LCD panels under several state laws, including the Minnesota Antitrust Act, to the amount of

overcharge they actually absorbed, and excluding what they passed on to their downstream customers. *See* Appellant-Cross-Appellee's Excerpts of Record ("ER") 838 (Dkt. No. 226).

The district court granted the motion. *See* Appellees-Cross-Appellants' Supplemental Excerpts of Record ("SER") 24-33. The court recognized that the Minnesota Antitrust Act expressly contemplates that plaintiffs will only recover their "actual damages sustained" and that allowing a pass-on defense is consistent with the statute's provision expressly permitting courts to "take any steps necessary to avoid duplicative recovery against a defendant." SER 33 (citing Minn. Stat. § 325D.57). Since Minnesota law permits purchasers even further downstream to recover for any portion of an overcharge passed on to them, allowing upstream plaintiffs to recover without accounting for pass-on would lead to duplicative damages and permit recovery in excess of the actual damages sustained. The court also rejected the Best Buy Plaintiffs' contention that two Minnesota Supreme Court cases—*Lorix v. Crompton Corp.*, 736 N.W.2d 619 (Minn. 2007) and *State by Humphrey v. Philip Morris*, 551 N.W.2d 490 (Minn. 1996)—rejected the availability of a pass-on defense under the Minnesota's Antitrust Act.

HannStar's Pass-On Defense. At trial, the defendants' expert, Dean Edward Snyder, explained the concept of pass-on and why it was relevant to a

proper accounting of the actual damages incurred by different parties along the distribution chain. ER 486-87. Dean Snyder opined that sellers of TFT-LCD finished products, on average, passed on 84 percent of the overcharges associated with TFT-LCD panels to the Best Buy Plaintiffs. ER 498. According to Dean Snyder, the Best Buy Plaintiffs then passed on an average of 93 percent of any such overcharges to its own customers. *Id.*

Accounting for these pass-on rates, Dean Snyder's estimate of the damages incurred by the Best Buy Plaintiffs from its indirect purchases of *all* TFT-LCD panels totaled $996,834 for the period of August 1998 to December 2006, and $946,055 for September 2001 to December 2006. ER 784. These numbers were in stark contrast to the indirect damages estimates presented by the Best Buy Plaintiffs' expert, which amounted to $485.7 million and $404.9 million for the same two respective time periods. ER 381-83.

The District Court's Instructions Regarding Pass-On And The Jury's Indirect Damages Award. At the close of trial, the district court instructed the jury that Minnesota state law does not entitle the Best Buy Plaintiffs to recover damages for any alleged overcharges that they passed on to their own customers of TFT-LCD finished products. ER 610. The court further instructed that it was Toshiba's and HannStar's burden to prove that the Best Buy Plaintiffs passed on some or all of the overcharge on TFT-LCD panels to their customers. ER 611.

Question 10 of the special verdict form asked the amount of damages the Best Buy Plaintiffs proved as a result of their indirect purchases of TFT-LCD panels from the panels conspiracy. ER 16. The jury answered $ 0. *Id.*

SUMMARY OF ARGUMENT

Reply In Support Of HannStar's Appeal

The Best Buy Plaintiffs offer no response to the fact that the district court erred in denying HannStar's motion for judgment as a matter of law.

First, the FTAIA precludes recovery of damages from HannStar, and the Minnesota Antitrust Act does not provide an alternative ground to uphold the judgment. The district court did *not* conclude that the judgment can be sustained under Minnesota law notwithstanding the FTAIA. At best, the Best Buy Plaintiffs' new argument seeks affirmance on an alternative ground that was never decided by the district court. As such, HannStar has not waived its response to this new argument. Moreover, even if the Minnesota Antitrust Act did purport to apply to foreign conduct that the FTAIA exempts from the Sherman Act, such state claims would be preempted by the foreign affairs doctrine and nonjusticiable under the doctrine of international comity.

Second, this court's recent decision in *Hsiung* bears nothing on whether the Best Buy Plaintiffs presented sufficient evidence at the trial *in this case* to satisfy the FTAIA. *Hsiung* is a criminal case in which the government proved that a

different member of the TFT-LCD panels conspiracy (AU Optronics) had actually imported panels into the United States. *See* 778 F.3d at 756. Here, the Best Buy Plaintiffs did not present evidence that HannStar imported *any* panels into the United States as part of the finished products purchased by the Best Buy Plaintiffs. And, as admitted indirect purchasers of TFT-LCD panels, the Best Buy Plaintiffs lack standing under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), to seek damages from HannStar—an additional roadblock that was not pertinent to the government's criminal case in *Hsiung*.

The Best Buy Plaintiffs' failed reliance on *Hsiung* and their attempt to rely on Minnesota antitrust law amount to a practical concession that they failed to present sufficient evidence to satisfy the requirements of the FTAIA. In entering judgment against HannStar, the district court misunderstood the jury's special verdict answers. A close reading of the special verdict reveals that the jury found that HannStar did not engage in import trade or commerce. Coupled with its finding that HannStar also did not engage in conduct that satisfies the FTAIA's domestic effects exception, the jury reached a conclusion that has, in recent months, been validated by several sister courts of appeals. The law is now clear. Participation in a foreign conspiracy to fix the price of inputs sold abroad is conduct that satisfies neither the FTAIA's import commerce exclusion nor the domestic effects exception, even when those inputs are later incorporated into

finished products imported into the United States. *See Motorola*, 775 F.3d at 816. The district court's entry of judgment resulted in an unprecedented and unauthorized extraterritorial application of the Sherman Act to wholly foreign conduct by HannStar that caused direct foreign injury but only derivative domestic injury.

Third, the Best Buy Plaintiffs do not refute, and even concede, that they failed to offer any proof of individualized injury-in-fact as to each of the six Best Buy entities. *See* Response Br. 42. They attempt to sidestep this failure by faulting HannStar for not countering their unilateral approach. Their argument fails because it is *their* burden to prove the requisite injury-in-fact for Article III and antitrust standing. Their reliance on the Third Circuit's decision in *Inter Medical Supplies Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446 (3d Cir. 1998), is also misplaced, as the court there merely concluded that the plaintiff did not have to prove what proportion of an aggregate damages amount was attributable to each of the individual *defendants*. The Best Buy Plaintiffs' damages evidence did not distinguish between any of the six Best Buy entity *plaintiffs* and fell far short from establishing the requisite injury-in-fact to give rise to Article III or antitrust standing. This failure alone warrants reversal of the judgment.

Response To The Best Buy Plaintiff's Cross-Appeal

The district court did not err in granting partial summary judgment to permit HannStar to present a pass-on defense to the Best Buy Plaintiffs' indirect purchaser claims under Minnesota law. The Minnesota Supreme Court did not hold—in either *Philip Morris* or *Lorix*—that the Minnesota Antitrust Act precludes a pass-on defense to indirect purchaser damages claims. Both cases involved the threshold inquiry of whether indirect purchasers had standing to even pursue their damages claims. In *Philip Morris*, the court merely held that a pass-on defense could not be asserted to deny a plaintiff standing to assert an indirect purchaser damages claim because the Minnesota Antitrust Act confers standing upon indirect purchasers to bring those claims. *See* 551 N.W.2d at 497. But this decision said nothing about whether a defendant can introduce evidence that an overcharge was passed-on to a downstream customer to refute a plaintiff's attempt to prove actual damages. And in *Lorix* the court acknowledged the distinction between standing to pursue such claims and successful proof of actual indirect purchaser damages. *See* 736 N.W.2d at 635.

The only reasonable conclusion (which the district court reached) is that a pass-on defense is permitted under the Minnesota Antitrust Act, especially because it permits indirect purchasers to recover damages. This much is plain on the face of the statute, which instructs courts to take measures to "avoid duplicative

recovery against a defendant." Minn. Stat. § 325D.57. The district court properly permitted HannStar to pursue a pass-on defense at trial. Reversal on this ground is unwarranted.

STANDARD OF REVIEW FOR ISSUES ON CROSS-APPEAL

This Court "reviews a grant or denial of a summary judgment de novo." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1023 (9th Cir. 2012).

This court "review[s] de novo a district court's interpretation of law, including state law." *Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422, 426-27 (9th Cir. 2011).

ARGUMENT

REPLY IN SUPPORT OF HANNSTAR'S APPEAL

I. The Minnesota Antitrust Act Does Not Provide An Independent Basis For Affirming The Judgment

In an attempt to divert this Court's attention from the core issue of whether they satisfied the requirements of the FTAIA, the Best Buy Plaintiffs first argue that the Minnesota Antitrust Act provides an independent and alternative ground to affirm the judgment. *See* Response Br. 11-13. They further contend that HannStar waived any counterargument by not anticipating this argument and refuting it, in HannStar's Opening Brief. *See id.* at 14-15.

In so arguing, the Best Buy Plaintiffs misunderstand appellate waiver principles, which never require an appellant to anticipate and refute possible

grounds for decision that the court below did not rely on. And on the substance their argument has no merit. The Best Buy Plaintiffs point to no authority suggesting that Minnesota law authorizes an application of state antitrust law to conduct that the FTAIA wholly exempts from the Sherman Act. And even if Minnesota law *were* interpreted so expansively, it would be preempted by the foreign affairs doctrine and otherwise nonjusticiable under the doctrine of international comity.

A. HannStar Has Not Waived Its Rebuttal To The Best Buy Plaintiffs' New Argument For Affirmance On An Alternative Basis Not Found By The Court Below

At the outset, the Best Buy Plaintiffs conflate two distinct issues in asserting waiver: (1) whether an appellant has waived a challenge to a judgment by failing to address all independent grounds actually reached by the district court in entering judgment; and (2) whether a judgment can be upheld on an alternate ground *not* reached by the district court. Though the Best Buy Plaintiffs cast their argument for affirmance as premised on the former issue, it is actually premised on the latter.

The district court did *not* deny HannStar's motion for judgment as a matter of law on the ground that its judgment rested independently on Minnesota antitrust law even though the FTAIA exempts HannStar's conduct from the Sherman Act. The court simply rejected HannStar's argument that *due process* barred state law claims, holding that the Best Buy Plaintiffs could sue under the Minnesota

Antitrust Act because they had presented evidence that "the agreement to purchase price fixed goods was negotiated and entered into in that state." ER 7. The district court said nothing about whether its judgment could also be sustained independently on the notion that Minnesota's antitrust law reaches wholly foreign conduct that the FTAIA places beyond the grasp of the Sherman Act.[1] *See id.* And the district court certainly never embraced such a rationale to hold, alternatively, that Minnesota state law rendered the federal issues in this case irrelevant.

The Best Buy Plaintiffs therefore are asking this Court to affirm on an alternative ground that the district court did not reach. There can be no waiver in these circumstances, and Plaintiffs cite no authority for such a radical proposition. To be sure, only the "failure of a party in its opening brief to challenge an alternate ground for a district court's ruling *given by the district court* waives that challenge." *Rodriguez v. Hayes*, 591 F.3d 1105, 1118 n.6 (9th Cir. 2010) (emphasis added). But as this Court has made clear, the critical prerequisite for

---

[1] In fact, in denying summary judgment in the related indirect purchaser class action, the district court expressly declined to reach the issue of whether the FTAIA precluded the state law claims asserted by the indirect purchaser class because they had established a genuine issue of material fact regarding whether the defendants' alleged conduct satisfied the FTAIA's domestic effects exception. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d 953, 967-68 (N.D. Cal. 2011). Here, the district court, having (mistakenly) concluded that the Best Buy Plaintiffs satisfied the requirements of the FTAIA, also did not reach the issue of whether their Minnesota state law antitrust claims could reach conduct that the FTAIA places beyond the scope of the Sherman Act. *See* ER 7.

waiver in such a situation is that the independent ground must actually have been reached by the court below, for an appellant "does not waive a challenge to any ground . . . in its opening brief on appeal that was *not relied on* in the district court's order." *Id.* (emphasis added). Appellants otherwise would be placed in the impossible position of having to anticipate the myriad ways a party may try to defend an order on appeal and preemptively argue against all of them. Nothing underlying the principles of appellate waiver warrants such an unfair and inefficient rule.

Because the Best Buy Plaintiffs merely offer alternative grounds for affirming the judgment, HannStar is free to counter those arguments and this Court is free to consider them. *See, e.g.*, *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1430 (9th Cir. 1995) (addressing appellant's "three independent grounds to justify affirmance" of the district court's entry of summary judgment and concluding each was "without merit").

B. The Minnesota Antitrust Act Does Not Conflict With The FTAIA And, Thus, Does Not Provide An Alternate Ground For Affirmance

There is no support for the Best Buy Plaintiffs' contention that the district court judgment can be affirmed under the Minnesota Antitrust Act even when a claim is barred by the FTAIA. It is well-established that "Minnesota's antitrust laws are generally interpreted consistently with federal courts' construction of

federal antitrust laws." *Minnesota Twins Partnership v. State ex rel. Hatch*, 592 N.W.2d 847, 851 (Minn. 1999); *see also Lorix*, 736 N.W.2d at 626 (same). Courts in Minnesota have long recognized that "policy considerations suggest following federal precedent," *State by Humphrey v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 894 (Minn. Ct. App. 1992), and this interpretive presumption ceases to apply only where "Minnesota law *clearly conflicts*." *Howard v. Minnesota Timberwolves Basketball Ltd. Partnership*, 636 N.W.2d 551, 556 (Minn. Ct. App. 2001) (emphasis added).

The Best Buy Plaintiffs point to no provision within the Minnesota Antitrust Act that clearly conflicts with the FTAIA, or otherwise authorizes an application of the state's antitrust laws to conduct that lies even beyond the reach of federal antitrust law. Nor do they offer any other indicia that the Minnesota legislature intended for the state's antitrust laws to apply in such fashion. Rather, and contrary to unequivocal Minnesota precedent requiring consistent interpretations between Minnesota's antitrust law and its federal counterparts absent a clear conflict, the Best Buy Plaintiffs premise their argument on the lack of any specific provision in the FTAIA expressly preempting remedies under state law. Response Br. 14-15. They further attempt to create a conflict by referencing language in the Export Trading Company Act of 1982 that apparently expressly "limit[s] both federal and state antitrust law in relation to foreign commerce." *Id.* at 15.

These assertions rest entirely on an inverted conflicts analysis between federal and state antitrust laws. Federal and state antitrust laws provide concurrent systems of private antitrust enforcement, and a conflicts analysis requires looking at the *state*'s antitrust law to determine whether it applies where federal law does not. *See Lorix*, 736 N.W.2d at 628; *Howard*, 636 N.W.2d at 556. There is nothing in the Minnesota Antitrust Act or Minnesota case law to suggest that the state's antitrust law can reach conduct that the FTAIA expressly places beyond the reach of the federal antitrust laws. No inference can be drawn from the FTAIA's silence about state law claims or the Minnesota Antitrust Act's silence regarding foreign conduct. To the contrary, the presumption that Minnesota's antitrust law must be interpreted harmoniously with federal antitrust law means that these silences should be filled by an application of the FTAIA to claims asserted under the Minnesota Antitrust Act.

C. Any Application Of Minnesota's Antitrust Act To Claims Barred By The FTAIA Would Also Be Preempted By The Foreign Affairs Doctrine And Principles Of International Comity

Even if Minnesota's antitrust law did reach conduct that the FTAIA exempts from Sherman Act scrutiny (it does not), it would be preempted under the foreign affairs doctrine. Any such claims brought under the Minnesota Antitrust Act would also be nonjusticiable under principles of international comity.

The foreign affairs doctrine mandates that federal courts "dismiss state law claims based on their potential to interfere with U.S. foreign relations." *Mujica v. AirScan Inc.*, 771 F.3d 580, 597 (9th Cir. 2014). This is because "[t]he Constitution gives the federal government the exclusive authority to administer foreign affairs." *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071 (9th Cir. 2012). The Supreme Court and this Court have accordingly held state laws unconstitutional when they "conflict[] with a federal action such as a treaty, federal statute, or express executive branch policy." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2009) (collecting cases). And even absent conflict, the Supreme Court "has declared state laws to be incompatible with the federal government's foreign affairs power." *Id.* at 961 (citing *Zschernig v. Miller*, 389 U.S. 429, 432 (1968); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941)).

In fact, the court in *In re Intel Corp. v. Microprocessor Antitrust Litigation*, 476 F. Supp. 2d 452, 457 (D. Del. 2007), addressed this very issue and held that California's antitrust and unfair competition laws could not be applied "beyond the boundaries set by the FTAIA." The court explained that "'[f]oreign commerce is pre-eminently a matter of national concern,' and therefore, it is important for the Federal Government to speak with a single, unified voice." *Id.* (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979)). Given that

"Congress has spoken under the FTAIA," "Congress's intent would be subverted if state antitrust laws were interpreted to reach conduct which the federal law could not." *Id.* Similarly, here, even if Minnesota attempted to confer a right under its own antitrust law to recover damages for foreign conduct, that law would be preempted by the foreign affairs doctrine, because the FTAIA immunizes such conduct from the Sherman Act in the first place. *See id; see also Deutsch v. Turner Corp.*, 324 F.3d 692, 712 (9th Cir. 2003) (invalidating a California statute conferring a right to recover for wartime acts where the federal government had "already exercised its own exclusive authority to resolve the war," but chose "not . . . to incorporate into that resolution a private right of action").

The court in *In re Static Random Access Memory (SRAM) Antitrust Litigation*, No. 07-md-01819 CW, 2010 WL 5477313, at *4 (N.D. Cal. Dec. 31, 2010), also reached the same conclusion. There, the court held that the FTAIA applied to the state law antitrust claims asserted by a class of indirect purchasers of SRAM products that were originally sold by the defendants to a customer in a foreign country. *Id.* The court rejected the contention that the FTAIA cannot withdraw jurisdiction over state law antitrust claims merely because federal antitrust law does not preempt state law, and concluded that "foreign commerce is 'preeminently a matter of national concern' on which the federal government has

historically spoke with 'one voice.'" *Id.* (quoting *Japan Line*, 441 U.S. at 448, 453-54).

A cause of action under a state law seeking antitrust remedies for foreign conduct subject to the FTAIA would also be nonjusticiable under the doctrine of international comity. "International comity is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Mujica*, 771 F.3d at 597 (citations and internal quotation marks omitted). The Supreme Court has made clear that "principles of prescriptive comity" guide interpretations regarding the metes and bounds of the Sherman Act's extraterritorial reach under the FTAIA. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004). That is why the Court in *Empagran* recognized that "[w]here foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects," the FTAIA's domestic effects exception does not apply to permit an application of the Sherman Act to that foreign conduct. *Id.*

The same principles of prescriptive comity would have to apply, with even greater force, to the proper understanding of Minnesota state law. If the Supreme Court believes it would violate international comity for the United States to

attempt to regulate that conduct, *see Empagran*, 542 U.S. at 169, then state antitrust law surely cannot reach foreign conduct that is immune from federal antitrust scrutiny under the FTAIA. For the interests of an individual state are afforded even less weight: "there is always a risk that 'our foreign relations could be impaired by the application of state laws, which do not necessarily reflect national interests.' Out of regard for that risk, we should be careful not to give undue weight to states' prerogatives." *Mujica*, 771 F.3d at 604 (citing *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1232-33 (11th Cir. 2004)). Indeed, this Court recently held that the doctrine of international comity warranted the dismissal of state law torts claims premised on foreign conduct that lay beyond the extraterritorial reach of the Alien Tort Statute. *See id.* at 615. Even if Minnesota's antitrust statute did purport to authorize claims for damages premised on conduct beyond the scope of the Sherman Act, the same result would be warranted here.

II. The District Court Erred In Denying HannStar's Motion For Judgment As A Matter Of Law Because The Best Buy Plaintiffs Failed To Satisfy The Requirements Of The FTAIA

HannStar is entitled to judgment as a matter of law because the Best Buy Plaintiffs failed to prove that HannStar engaged in conduct that satisfies the requirements of the FTAIA. The FTAIA precludes an application of the Sherman Act to "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless" certain express prerequisites are satisfied.

15 U.S.C. § 6a. First, "import trade or import commerce" with foreign nations is unaffected by the FTAIA and is subject to a regular application of the Sherman Act. *See Empagran*, 542 U.S. at 162; *Hsiung*, 778 F.3d at 751. Second, the FTAIA places all foreign conduct that *does not* involve import trade or commerce presumptively beyond the scope of the Sherman Act. *Empagran*, 542 U.S. at 162. Third, such wholly foreign conduct can be brought back within the reach of the Sherman Act only if the FTAIA's domestic effects exception is met. *Hsiung*, 778 F.3d at 751. This means that the nonimport activity must "*both* (1) sufficiently affect[] American commerce, *i.e.*, it has a 'direct, substantial, and reasonably foreseeable effect' on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, *i.e.*, the 'effect' must 'giv[e] rise to a [Sherman Act] claim." *Empagran*, 542 U.S. at 162 (citing 15 U.S.C. §§ 6a(1), (2)) (alterations and emphasis in original).

The Best Buy Plaintiffs argue that the judgment must be affirmed because: (1) this case involves the same TFT-LCD panels conspiracy as the *Hsiung* case in which this Court held the FTAIA was satisfied; (2) they adduced sufficient evidence at trial that HannStar engaged in import commerce; and (3) the jury's "Yes" answer to Question 4 of the special verdict form (which asked whether "the conspiracy involving [] imported TFT-LCD panels and/or finished products produced substantial intended effects in the United States," ER 14) suffices to

satisfy the FTAIA's domestic effects exception. As discussed below, none of these arguments has merit.

A. Recent Decisions Clarify That The FTAIA Precludes Domestic Purchasers Of Finished Products From Seeking Damages From Participants In A Foreign Conspiracy That Fixed Only The Price Of A Component In The Finished Product

Since HannStar filed its Opening Brief, this Court and the Seventh Circuit have further clarified the scope of the FTAIA, specifically as applied to foreign price-fixing conspiracies when the price-fixed product is sold exclusively overseas to foreign buyers, and then incorporated into finished products that are subsequently imported into the United States. In the Seventh Circuit's amended opinion in *Motorola*, the court held that the defendants' alleged foreign sales of price-fixed TFT-LCD panels to Motorola's foreign subsidiaries is *not* import commerce because "[i]t was Motorola, rather than the defendants, that imported these panels into the United States, as components of the cellphones that its foreign subsidiaries manufactured abroad[.]" 775 F.3d at 818. These foreign sales did not satisfy the FTAIA's domestic effects exception either. Though the Seventh Circuit assumed that "the requirement of a direct, substantial, and reasonably foreseeable effect on domestic commerce has been satisfied," those foreign sales did not "give rise to an antitrust cause of action"—the second requirement of the domestic effects exception. *Id.* at 819 (citing 15 U.S.C. § 6a(2)).

The *Motorola* defendants' foreign sales of price-fixed TFT-LCD panels did not "give rise" to a federal antitrust claim under the FTAIA's domestic effects exception because it was Motorola's foreign subsidiaries, and not Motorola, who were the "immediate victims of the price-fixing." *Id.* at 820. Thus, as an indirect purchaser that suffered merely derivative injury, Motorola lacked antitrust standing under the decades-old *Illinois Brick* rubric to seek damages under the Sherman Act. *Id.* at 821. The Seventh Circuit explained:

> Nothing is more common nowadays than for products imported to the United States to include components that the producers bought from foreign manufacturers. . . . [T]he prices of many products exported to the United States doubtlessly are elevated to some extent by price fixing . . . that would be punished in proceedings under the Sherman Act if committed in the United States.

Id. at 824 (citations omitted). But because defendants only sold price-fixed TFT-LCD panels to foreign buyers, they were exempt from the Sherman Act under the FTAIA.

The Seventh Circuit further explained that permitting Motorola to maintain a Sherman Act claim on the basis of this foreign conduct would result in a "rampant" extraterritorial application of U.S. law that "creates a serious risk of interference" with foreign countries' regulation of their own commercial affairs—the very result the Congress enacted the FTAIA to prevent. *Id.* (quoting *Empagran*, 542 U.S. at 165). It would run contrary to Congress's intent by "enormously increas[ing] the

global reach of the Sherman Act[] [and] creating friction with many foreign countries and 'resent[ment at] the apparent effort of the United States to act as the world's competition police officer,' a primary concern motivating the [FTAIA]." *Id.* (citation omitted).

This Court's amended opinion in *Hsiung* reaffirmed the reasoning of the Seventh Circuit in *Motorola*. In *Hsiung*, this Court upheld the criminal convictions of AU Optronics, its American subsidiary, and two executives for conspiring to fix the prices of TFT-LCD panels by rejecting, in relevant part, their contention that the evidence failed to satisfy the requirements of the FTAIA. 778 F.3d at 753. Unlike the evidence in *Motorola*, and unlike the evidence at trial in this case, the evidence in *Hsiung* established that the AUO defendants had themselves directly engaged in import commerce: "Trial testimony established that AUO imported over one million price-fixed panels per month into the United States," and "that AUO and AUOA executives and employees negotiated with United States companies in the United States to sell TFT-LCD panels." *Id.* at 756.

This Court, like the Seventh Circuit, accepted that the defendant's participation in a foreign conspiracy that fixed the price of TFT-LCD panels that were sold abroad but later incorporated into finished products "destined for sale in the United States" was sufficiently "'direct, substantial and reasonably foreseeable' with respect to the effect on United States commerce." *Id.* at 757, 759 (citing 15

U.S.C. § 6a). But unlike Motorola, the government satisfied the second prong of the domestic effects exception in *Hsiung* because its criminal prosecution is not affected by the *Illinois Brick* doctrine excluding civil claims by indirect purchasers (such as Motorola). *Id.* at 760. This conclusion is consistent with the Seventh Circuit's recognition that the foreign price-fixing conduct by the *Motorola* defendants (which included AU Optronics) would nevertheless have been subject to a *criminal* antitrust action even though it did not "give rise" to a private antitrust claim for damages. *See id.* at 760 (citing *Motorola*, 775 F.3d at 825).

The amended opinions in *Hsiung* and *Motorola*, both issued upon denials of rehearing and rehearing *en banc*, make clear that HannStar's participation in the foreign TFT-LCD panels price-fixing conspiracy—the only conduct proven by the Best Buy Plaintiffs at trial—and any foreign sales of panels to foreign buyers neither constitutes import trade or commerce, nor satisfies the domestic effects exception under the FTAIA.

B. *Hsiung* Does Not Establish That The Evidence In This Case Was Sufficient To Satisfy The FTAIA

The Best Buy Plaintiffs are simply incorrect that this Court's decision in *Hsiung* resolves whether they satisfied the requirements of the FTAIA in this case. First, Plaintiffs mischaracterize the holding in *Hsiung* by asserting that this Court held "as a matter of law that this same TFT-LCD conspiracy . . . involved both import trade or import commerce . . . as well as conduct that meets the 'domestic

effects' exception." Response Br. 20. This Court instead held that there was sufficient evidence of import trade in *Hsiung* because the government proved that AU Optronics actually *imported* millions of TFT-LCD panels into the United States. *See Hsiung*, 778 F.3d at 756. There is no such evidence here.

Second, AU Optronics' participation in the foreign TFT-LCD panels conspiracy, and its foreign sales of those price-fixed panels, satisfied the "gives rise to" prong of the domestic effects exception because *Hsiung* involved criminal enforcement of the Sherman Act and was thus unaffected by *Illinois Brick*. *Id.* at 760. Indeed, this Court reaffirmed the Seventh Circuit's reasoning in *Motorola* by recognizing that AU Optronics' conduct would *not* satisfy the domestic effects exception in a private antitrust action brought by a U.S. indirect purchaser plaintiff (like the Best Buy Plaintiffs here). *Id.*

A proper analysis under the FTAIA requires this Court to focus on the particular evidence and claims in this particular case. *See Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 398 (2d Cir. 2002) ("[The] text of the FTAIA clearly reveals that its focus is not on the plaintiff's injury, but on the defendant's conduct[.]"), *abrogated on other grounds by Empagran*, 542 U.S. at 164. The Best Buy Plaintiffs cannot credibly contend that evidence adduced against a *different defendant* by a *different plaintiff* in a *different case* (a criminal one, no less) can somehow make up for their failure to prove, in their own trial, that HannStar

engaged in the kind of conduct required to satisfy the requirements of the FTAIA. In *Hsiung*, the defendants were AU Optronics, its American subsidiary, and two of its executives. Here, the defendant was HannStar. In *Hsiung*, the government proved that the defendants actually imported price-fixed TFT-LCD panels. Here, the Best Buy Plaintiffs offered no evidence as to whether HannStar imported anything and, in fact, admitted they bought and imported nothing directly from HannStar. *See* Response Br. 27.

It is telling that the Best Buy Plaintiffs stop well short of attempting to invoke any estoppel doctrine such as *res judicata* or collateral estoppel. HannStar was not a party in the *Hsiung* case and as a matter of basic due process cannot be bound by the outcome or by any findings made in a case where it had no opportunity to be heard. *See Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) ("'[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party.'" (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)) (emphasis in original)). Had the Best Buy Plaintiffs introduced the same evidence about AU Optronics introduced by the government in the *Hsiung* criminal trial, there still would not have been sufficient evidence for the jury to conclude that *HannStar*—as is relevant in this case—engaged in import commerce.

The Best Buy Plaintiffs instead focused almost entirely at trial on trying to establish that Toshiba was a participant in the TFT-LCD panels conspiracy. They

assumed that successful proof of Toshiba's participation in the TFT-LCD panels conspiracy would satisfy the requirements of the FTAIA, as Toshiba sold and imported both TFT-LCD panels and finished products containing those panels into the United States. The Best Buy Plaintiffs, however, neglected to introduce any evidence regarding whether HannStar itself engaged in import commerce. And when their efforts to prove Toshiba's participation in the TFT-LCD panels price-fixing conspiracy failed, what remained was a complete absence of evidence that HannStar imported TFT-LCD panels, and surely no evidence (as the Best Buy Plaintiffs admit) that HannStar engaged in *any* import transactions with the Best Buy Plaintiffs at all, much less any transactions *in* the United States. The FTAIA's import commerce exclusion requires proof of direct transactions between a *defendant* and a U.S. plaintiff. *See Kruman*, 284 F.3d at 398; *Minn-Chem, Inc. v. Agrium*, 683 F.3d 845, 855 (7th Cir. 2012) (en banc). The Best Buy Plaintiffs offered no such proof at their own trial. They cannot cure that failure by relying on evidence about a different conspirator (AU Optronics) presented by a different plaintiff (the government) in a different trial (*Hsiung*).

To find that the requirements of the FTAIA were satisfied, the jury in *this case* had to hear evidence sufficient to establish that HannStar engaged in import trade or commerce, or otherwise engaged in conduct satisfying the domestic effects exception. The Best Buy Plaintiffs presented evidence of neither. The jury's

special verdict answers indicate that it found there to be insufficient evidence of either, and indeed there was none. The district court erred in entering judgment for the Best Buy Plaintiffs.

C. The Jury's Special Verdict Did Not Find That HannStar's Conduct Involved Import Commerce And There Was No Evidence At Trial To That Effect

The Best Buy Plaintiffs invoke the evidence presented by the government in *Hsiung* (but not presented to the jury in this trial) in an attempt to mask their own failure to adduce any evidence that HannStar engaged in import commerce. Despite the contention that "the jury heard extensive evidence . . . that HannStar's conduct involved import commerce," Response Br. 26, the Best Buy Plaintiffs point only to evidence of HannStar's guilty plea in the government's criminal antitrust case against it and to email communications that merely establish that HannStar participated in the foreign TFT-LCD panels conspiracy. But this evidence, as explained in HannStar's Opening Brief, does not amount to import commerce. *See* Opening Br. 31-36.

1. Participation In A Conspiracy That Fixes The Price Of Inputs Sold Abroad Is Not Conduct Involving Import Trade Or Commerce, Even If Those Inputs Are Incorporated Into Finished Products Later Imported Into The United States

The recent decisions in *Hsiung* and *Motorola* both confirm that the mere participation in a foreign conspiracy to fix the price of an input sold abroad and incorporated into a finished product abroad does *not* constitute import commerce

under the FTAIA, even if some of those finished products ultimately end up in the United States. This additional guidance, however, is nothing new. It just built upon a substantial body of prior case law that has consistently interpreted the import commerce exclusion under the FTAIA narrowly. *See, e.g.*, *Carpet Grp. Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 72 (3d Cir. 2000) ("[The FTAIA] differentiates between conduct that 'involves' [import] commerce, and conduct that 'directly, substantially, and foreseeably' affects such commerce. To give the latter provision meaning, the former must be given a relatively strict construction."), *overruled on other grounds by Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 466 (3d Cir. 2011); *see also* Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 272i (4th ed. 2013) ("[I]mport commerce involves transactions in which the seller is located abroad while the buyer is domestic and goods flow into the United States.").

For example, in *Minn-Chem*, the Seventh Circuit explained that import commerce is limited to "transactions that are *directly* between [U.S.] plaintiff purchasers and [] defendant cartel members," and concluded the foreign conduct fell "outside the arena of simple import transactions" even though it contributed to the "inflated benchmark prices" paid by U.S. purchasers. 683 F.3d at 855. And in *Kruman*, the Second Circuit held that a conspiracy by two auction houses to fix the

prices of their auctioneering services in markets abroad did not constitute import commerce even though some of the goods purchased or sold at those foreign auctions "may ultimately have been imported . . . into the United States," as "the object of the conspiracy was the price that the defendants charged for their auction services, *not* any import market for those goods." 284 F.3d at 395-96. The Sixth and Third Circuits have also applied similarly narrow definitions of import commerce. *See Carrier Corp. v. Outokumpu Ojy*, 673 F.3d 430, 438 n.3, 440 (6th Cir. 2012) (limiting the FTAIA's import commerce exclusion to transactions involving goods manufactured abroad and sold in the United States); *Turicentro S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 302-03 (3d Cir. 2002) (observing that to trigger the FTAIA's import commerce exclusion, "[g]enerally, the conduct must involve a United States purchaser or seller" and must "directly increase[] or reduce imports into the United States"), *overruled on other grounds by Animal Sci. Prods.*, 654 F.3d at 467.

This established precedent recognizes that an overly expansive interpretation of import commerce under the FTAIA would engulf purely foreign transactions that Congress intended to be evaluated under the statute's domestic effects exception.[2] As the Supreme Court has emphasized, Congress did not intend for the

[2] The FTAIA's legislative history also supports a narrow reading of the import commerce exclusion. It provides: "A transaction between two foreign firms . . .

FTAIA to expand the Sherman Act's scope as applied to foreign commerce. *Empagran*, 542 U.S. at 169. Every court that has addressed the limits of the import commerce exclusion has adhered to this principle. It is clear under this weight of authority that a party like HannStar that fixes the price of an input, and makes only the initial foreign sale of that input, has not engaged in "import trade" or "import commerce" under the FTAIA, regardless of whether a finished product incorporating that input is later imported and sold into the United States.

2. The Evidence Was Insufficient To Establish That HannStar Or The TFT-LCD Panels Conspiracy Engaged In Import Commerce

Given this precedent, HannStar's criminal plea and email communication among members of the TFT-LCD panels conspiracy, which the Best Buy Plaintiffs incorrectly argue "indicate that the U.S. market was the ultimate target for many of the price-fixed panels," Response Br. 28, do not actually amount to evidence of import commerce *by HannStar*. As the Best Buy Plaintiffs acknowledge, they never purchased any TFT-LCD panels (or any finished products containing those

---

should not . . . come within the reach of our antitrust laws. Such foreign transactions should, for the purposes of this legislation, be treated in the same manner as export transactions—that is, there should be no American antitrust jurisdiction absent a *direct, substantial and reasonably foreseeable effect on domestic commerce*[.]" H.R. Rep. 97-686, at 9-10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494-95 (emphasis added).

panels) from HannStar.[3] *Id.* at 27. Nor do they refute HannStar's demonstration that the only evidence of importation they introduced related to importation by Toshiba—which the jury found did not even participate in the TFT-LCD panels conspiracy. *See* Opening Br. 32 (discussing absence of evidence regarding whether members of the TFT-LCD panels conspiracy imported panels given the jury's finding that Toshiba was not a co-conspirator).

Against this dearth of evidence, the Best Buy Plaintiffs' repeated assertion that HannStar is also liable for the import conduct of its co-conspirators is of no consequence. *See* Response Br. 28. The relevant inquiry under the FTAIA, and whether a foreign party can be subject to the grasp of U.S. antitrust law, is whether the *defendant* engaged in import trade or commerce. Every circuit that has addressed the application of the FTAIA has recognized that the statute's focus is on the conduct of the defendant. *See Kruman*, 284 F.3d at 398 (the focus of the FTAIA is on "the defendant's conduct"); *Carpet Group*, 227 F.3d at 71 ("The proper inquiry [is] . . . whether the alleged *conduct by the defendants* 'involved' import trade or commerce[.]" (emphasis in original)); *Minn-Chem*, 683 F.3d at 855

[3] Because the Best Buy Plaintiffs never purchased TFT-LCD panels directly from HannStar, HannStar's admission in its criminal plea that it "sold computer notebook and monitor TFT-LCDs into various markets, including the U.S." cannot satisfy the FTAIA's import commerce exclusion as to the Best Buy Plaintiffs' claims, as they (admittedly) never engaged in any direct transactions with HannStar. *See Minn-Chem*, 683 F.3d at 855.

("[T]ransactions that are directly between the plaintiff purchasers and the *defendant* cartel members are [] import commerce[.] (emphasis added)); *Hsiung*, 778 F.3d at 754 ("[T]he government did . . . prove that the *defendants* engaged in import trade." (emphasis added)). To satisfy the import commerce exclusion, the Best Buy Plaintiffs had to prove that *HannStar* imported TFT-LCD panels into the United States and sold them to the Best Buy Plaintiffs. As the Best Buy Plaintiffs acknowledge in their Response Brief (at 28), they *never* purchased any panels directly from HannStar.

Even if the law supported the notion that the import activity of one of HannStar's co-conspirators could allow the Best Buy Plaintiffs to recover damages from HannStar (it does not), the Best Buy Plaintiffs presented no *evidence* that any of those purported co-conspirators actually imported TFT-LCD panels (or even finished products) into the United States or sold them to the Best Buy Plaintiffs.[4] *See* Opening Br. 31-33 (discussing lack of evidence as to imports). And such

[4] The Best Buy Plaintiffs' reliance upon *Beltz Travel Service, Inc. v. International Transport Association*, 620 F.2d 1360, 1367 (9th Cir. 1980) is misplaced. The only pertinent language from *Beltz* is dicta recognizing joint and several liability for all members of a conspiracy if there is evidence establishing of a conspiracy and the participation in the conspiracy by all co-conspirators. *See id.* But here, there is no evidence that the TFT-LCD panels conspiracy involved anything other than the price-fixing of panels, or that it in any way targeted the U.S. import market for TFT-LCD panels. Given the scope of the TFT-LCD panels conspiracy, HannStar cannot be liable for the non-conspiratorial import conduct of its co-conspirators.

evidence would still be insufficient to permit the Best Buy Plaintiffs to recover damages from HannStar because any import conduct by a co-conspirator occurred outside the scope of the TFT-LCD panels conspiracy, which extended only to the fixing of TFT-LCD panel prices, and not the importation of those panels into *any* specific market, much less that of the United States. *See Kruman*, 284 F.3d at 395-96 (holding that where "the object of the conspiracy was the price that the defendants charged for their . . . services, and not any import market for those goods," the defendants did not engage in import commerce). On this record, the Best Buy Plaintiffs cannot refute that they failed to adduce evidence of any "direct transactions" between themselves (as U.S. plaintiffs) and HannStar that would be required to satisfy the FTAIA's import commerce exclusion. *See Minn-Chem*, 683 F.3d at 855.

The Best Buy Plaintiffs also mischaracterize the contents of HannStar's criminal plea and email communications between the crystal meeting participants in contending that such evidence established that the TFT-LCD panels conspiracy targeted the U.S. import market. *See* Response Br. 27-28. HannStar's criminal plea makes clear that the United States was neither the sole, nor primary target market for the its conduct, but rather one of numerous global markets in which it contemplated finished products containing its price-fixed TFT-LCD panels would

eventually be sold.[5] *See* ER 748-49; SER 94-95. The sole email communication cited by the Best Buy Plaintiffs fares no better. All it demonstrates (like the others) is that the crystal meeting participants discussed the United States as one of the many markets in which finished products containing price-fixed TFT-LCD panels were being sold. *See* SER 109.

Such evidence is a far cry from what courts have recognized as import trade or commerce under a target theory, which requires that a "defendant['s] alleged behavior [be] *directed at* an import market," *Animal Sci. Prods.*, 654 F.3d at 470 (emphasis added), or otherwise "directly increase[s] or decrease[s] imports in the United States," *Turicentro*, 303 F.3d at 303. For example, in *Carpet Group*, the Third Circuit held that the conduct of an association of oriental rug importers and wholesalers constituted import commerce under a target theory because they coerced their foreign suppliers against selling rugs directly to U.S. retailers to preserve their monopoly on the U.S. import market for oriental rugs. 227 F.3d at 72. The specific object of the conspiracy in *Carpet Group* was "to subvert

[5] The admission in HannStar's criminal plea that it "sold computer notebook and monitor TFT-LCDs into various markets, including the U.S.," ER 748, is also insufficient to establish import commerce to allow the Best Buy Plaintiffs to recover from HannStar, as the Best Buy Plaintiffs did not purchase these panels from HannStar (or any panels at all) and offered *no* evidence as to *any* transactions between themselves and HannStar.

commercial activities that solely impacted domestic commerce," *i.e.*, the U.S. import market for oriental rugs. *Id.*

In contrast, the specific object of the TFT-LCD panels conspiracy was only to fix the prices of TFT-LCD panels, not to restrict output in any targeted import market, much less one in the United States. ER 96-98, 681, 686, 688, 396-401, 748-49, 764-77. HannStar's criminal plea and email communications between the crystal meeting participants establish nothing more, and the Best Buy Plaintiffs' "[m]ere argument that [HannStar] must have harbored an inchoate hope or intention that their [panels] would reach the United States is insufficient." *In re SRAM Antitrust Litig.*, 2010 WL 5477313, at *7. The fact that HannStar and other members of the conspiracy contemplated that finished products containing their TFT-LCD panels would eventually be sold in the U.S. is inconsequential, and insufficient to allow a U.S. purchaser of the finished product (like the Best Buy Plaintiffs) to recover damages from members of a conspiracy whose object was to fix only the prices of an input.

The Seventh Circuit in *Motorola* held as much when it rejected an application of the target theory to the very same price-fixing conduct at issue here. The court explained that a cartel does not "target" purchasers of a finished product merely because it considers the sale price of a finished product containing a cartelized input, but rather this conduct just reflects "what is obvious"—"that firms

engaged in the price fixing of a component are critically interested in the market demand for the finished product," as "knowledge of that demand is essential to deciding on the optimal price of the component." *Motorola*, 775 F.3d at 822.

In many ways, this is an even easier case than *Motorola*, in which the FTAIA barred recovery by a domestic parent of damages from members of a cartel that engaged in direct transactions with the parent's foreign subsidiaries. To allow U.S. purchasers of finished products to recover damages on a "target" theory, as the Best Buy Plaintiffs call for here, "would nullify the doctrine of *Illinois Brick*." *Id.* "There is nothing unusual about firms trying to pass on cost increases to their buyers; the buyers are hurt but as long as *Illinois Brick* is the law their hurt doesn't give them an antitrust cause of action." *Id.* at 823. As admitted *indirect* purchasers of TFT-LCD panels from HannStar, *see* Response Br. 27, the Best Buy Plaintiffs' claim that HannStar and other members of the TFT-LCD panels conspiracy contemplated the price and destination of the finished products containing their panels is insufficient under *Motorola* to recover damages under a "target" theory.

3. The District Court Misinterpreted The Jury's Special Verdict As Finding That The TFT-LCD Panels Conspiracy Involved Import Commerce

The district court misinterpreted the jury's answers to the special verdict form, which do not contain any finding that HannStar's conduct involved import

commerce. In their Response Brief, the Best Buy Plaintiffs conveniently omit any reference to Question 2 of the special verdict form, which specifically asked whether the Best Buy Plaintiffs proved that HannStar "knowingly participated in a conspiracy to fix, raise, maintain or stabilize the prices of TFT-LCD *panels*." ER 13 (emphasis added). The conspiracy the jury found in Question 2 thus addressed only panels, and not finished products. Yet, in Question 3, the jury was asked about more than just the panels conspiracy and found that "the conspiracy involved imported TFT-LCD panels *and/or finished products* . . . imported into the United States" (Question 3 (emphasis added)). In Question 4, the jury was similarly asked and found that the "conspiracy involving these imported TFT-LCD panels *and/or finished products* produced substantial intended effects in the United States" (Question 4). ER 14. But to Question 5, which asked only whether the Best Buy Plaintiffs proved that the "conspiracy" in Question 2 "involved conduct which had a direct, substantial and reasonably foreseeable effect on trade or commerce in the United States," ER 14, the jury said "No."

Those answers leave only one possibility. The jury concluded that the conspiracy produced substantial intended effects in the U.S. but those effects were not "direct." And since any importation by the conspiracy itself would obviously have exhibited a direct effect, the jury clearly found that the only importation was of "finished products" (Question 3) rather than the "panels" (Question 2) that were

the object of the conspiracy. The conspiracy "involved" finished products imported into the U.S. (Question 3), but only in the causal sense that the conspirators knew it would happen—as an *indirect* consequence of the price-fixing of panels. And that does not establish import commerce by the members of the conspiracy, as a matter of law.

The district court actually harmonized the jury's special verdict answers in this way, despite erroneously concluding that the jury found that the Best Buy Plaintiffs satisfied the import commerce exclusion. As the court explained, the jury's "Yes" answers to Questions 3 and 4 were reconcilable with the "No" answer to Questions 5 because the evidence indicated that TFT-LCD panels "were incorporated into . . . finished products . . . that were imported into the United States[.]" ER 9-10. In other words, the jury's special verdict answers reflect a finding that the TFT-LCD panels conspiracy was limited to fixing the prices of just panels, but that those panels subsequently were incorporated into finished products imported into the United States. The district court thought that chain of events was sufficient to establish import commerce by the conspirators within the meaning of the FTAIA, but the law is contrary. *See Motorola*, 775 F.3d at 818.

D. The "Substantial Effects" Test Under *Hartford Fire* Is Not A Substitute For The FTAIA's Domestic Effects Exception

In a last attempt to salvage the district court's judgment, the Best Buy Plaintiffs contend that the jury's "Yes" answer to Question 4 of the special verdict,

which asked whether the TFT-LCD panels conspiracy involving "panels and/or finished products produced substantial intended effects in the United States[,]" is itself sufficient to satisfy the FTAIA's domestic effects exception, notwithstanding the jury's clear finding, in Question 5, that the TFT-LCD panels conspiracy did *not* involve conduct satisfying the FTAIA's domestic effects exception.

This Court has made clear that the *Hartford Fire* "substantial and intended effects" test is *not* a substitute for the domestic effects exception under the FTAIA. In *United States v. LSL Biotechnologies*, 379 F.3d 672, 679 (9th Cir. 2004), this Court considered and unequivocally rejected this very argument—that the FTAIA's domestic effects exception merely codified the *Hartford Fire* test—explaining instead that the *Hartford Fire* test lacks the directness requirement of the FTAIA's domestic effects exception. And recently in *Hsiung*, this Court reiterated that the "FTAIA's requirement that the defendants' conduct had a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce displaced the intentionality requirement of *Hartford Fire* where the FTAIA applies." 778 F.3d at 748 (citing *LSL Biotechnologies*, 379 F.3d at 678-79). A substantial and intended, but indirect, effect satisfies *Hartford Fire* but it does not satisfy the FTAIA. The jury's findings put this case precisely into that gap.

Question 4 of the special verdict form encompasses the "substantial and intended effects" test articulated in *Hartford Fire Insurance Co. v. California*, 509

U.S. 764, 796 (1993), which the Supreme Court applied to determine the jurisdictional status of an alleged foreign conspiracy to manipulate the U.S. insurance market. There is no support for the contention that the jury's "Yes" answer to Question 4 of the special verdict form is itself adequate to satisfy the FTAIA's domestic effects exception. As explained above and in HannStar's Opening Brief (at 28-31), when read in conjunction with the jury's other special verdict answers, the jury's answer to Question 4 can only be interpreted to mean that it found that the TFT-LCD panels conspiracy exhibited "substantial and intended effects" in the U.S., but that those effects were "indirect." And while the Best Buy Plaintiffs again attempt to rely on HannStar's guilty plea as evidence that its conduct exhibited "direct effects" on U.S. commerce, *see* Response Br. 37, an admission by HannStar that it sold TFT-LCD panels into the United States in a criminal plea is insufficient to satisfy the domestic effects test in a civil case brought by the *Best Buy Plaintiffs* when they (admittedly) purchased only finished products and were, thus, only indirect purchasers of those panels. This failure of proof was compounded even further by the Best Buy Plaintiffs' failure to present evidence that they even purchased finished products incorporating HannStar panels from any of HannStar's co-conspirators.

E. The Jury Correctly Found That HannStar's Conduct Did Not Satisfy The FTAIA's Domestic Effects Exception

The record clearly supports the jury's finding that the Best Buy Plaintiffs failed to prove any "direct, substantial, and reasonably foreseeable effects" on domestic commerce attributable to HannStar. Non-import foreign commerce may only come back within the Sherman Act through the domestic effects exception if it: (1) "has a direct, substantial, and reasonably foreseeable effects" on domestic commerce; *and* (2) "such effect gives rise to a claim" under Section 1 or Section 7 of the Sherman Act. 15 U.S.C. § 6a. Conduct is "direct" "'if it follows as an immediate consequences of the defendant[s'] activity.'" *Hsiung*, 778 F.3d at 758 (quoting *LSL Biotechnologies*, 379 F.3d at 680-61).

The evidence at trial established only that HannStar produced TFT-LCD panels, and sold those panels to foreign manufacturers of finished products. ER 441-42, 444-45, 507-08, 696-97. The jury properly recognized that selling panels overseas that are eventually incorporated into finished products imported into the United States is an *indirect* effect. *See LSL Biotechnologies*, 379 F.3d at 681 (effects based on "intervening developments" are "indirect"). And as a matter of substantive law, that effect does not "give rise" to a Sherman Act claim in an indirect purchaser like the Best Buy Plaintiffs. *See Motorola*, 775 F.3d at 818; *see also Lotes Co., Ltd. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 398 (2d Cir. 2014) (holding that the plaintiff failed to plausibly allege the FTAIA's domestic

effects exception because although it alleged a "direct, substantial and reasonably foreseeable effect," the effect of the defendant's conduct did not "give[] rise" to the plaintiff's claim). The law is now clear. In a private antitrust suit for damages, the domestic effects exception is not satisfied where, as here, a U.S. purchaser of finished products seeks *indirect* damages from a defendant who participated in a foreign conspiracy to fix the price of an input that was subsequently incorporated into finished products imported into the United States. *See Motorola*, 775 F.3d at 818.

III. The Best Buy Plaintiffs Failed To Prove Individual Injury-In-Fact

The Best Buy Plaintiffs also fail to offer any adequate response for their failure to present evidence to prove at trial individual injury-in-fact as to each of the six Best Buy entities. This ground alone merits reversal.

Individual injury-in-fact must be proved to establish Article III standing. *Gerlinger v. Amazon.com Inc.*, 526 F.3d 1253, 1255 (9th Cir. 2008) (citing *Allen v. Wright*, 468 U.S. 737, 750 (1984)). And in a case like this one, where a plaintiff seeks treble damages under Section 4 of the Clayton Act, each plaintiff must also establish antitrust standing. *Id.* "[A]ntitrust standing requires an inquiry beyond that performed to determine [Article III] standing." *Bubar v. Ampco Foods, Inc.*, 752 F.2d 445, 448 (9th Cir. 1985). It asks whether a plaintiff is the "proper party to bring a private action," an inquiry that requires "an evaluation of the plaintiff's

harm, the alleged wrongdoing by the defendant, and the relationship between them." *Id.* at 448-49 (citing *Assoc. Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 n.1 (1983)).

The Best Buy Plaintiffs do not dispute that at trial, they "presented damage calculations on behalf of all the Best Buy Plaintiffs, without differentiating between [the six] entities." Response Br. 42. This approach was insufficient to establish even basic individualized injury-in-fact required for Article III standing, notwithstanding the more stringent requirements of proving individual antitrust damages under Section 4 of the Clayton Act. Each of the six Best Buy entities bore the burden of proving individual injury-in-fact at trial. *See Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (a plaintiff must prove injury in fact at each successive stage of a litigation). Further, because they each sought antitrust damages, the individual damages they each suffered must have been proven with particularity. *See Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1045 (9th Cir. 1987) ("Injury to the *specific plaintiff* is the sine qua non of a section 4 claim[.]" (emphasis added)).

The Best Buy Plaintiffs' reliance on the Third Circuit's decision in *Inter Medical Supplies* as support for the lack of a need to prove specific and particularized injury as to each Best Buy entity is entirely misplaced. In *Inter Medical Supplies*, the defendant did not challenge the district court's judgment on

the ground that the plaintiffs failed to prove individual injury-in-fact or establish specific individual damages. Rather, the defendant challenged the damages award as speculative, given the plaintiffs' "fail[ure] to establish specific damages associated with each cause of action" and with each of the *defendants*. 181 F.3d at 461. The Third Circuit affirmed the judgment on the ground that the plaintiffs did not have to present evidence as to what proportion of the aggregate damages was attributable to each individual defendant. *See id.; see also Inter Medical Supplies Ltd. v. EBI Med. Sys., Inc.*, 975 F. Supp. 681, 691 (D.N.J. 1997) ("[D]efendants contend that the plaintiffs failed to present testimony separating the damages attributable to each entity and each claim.").

In an attempt to conjure up authority to defend their failure to prove individual injury-in-fact, the Best Buy Plaintiffs selectively misquote the language in *Inter Medical Supplies* to imply that it addressed a challenge to a damages award premised on the plaintiffs' failure to differentiate individual injury among themselves, when the issue was whether the plaintiffs had to allocate their damages among each individual *defendant*. *Inter Medical Supplies* thus has nothing to do with the Article III or antitrust standing requirements, nor does it contain anything to suggest that the Best Buy Plaintiffs were somehow relieved of their burden to establish individual injury as to each of the six Best Buy entities.

The law instead makes clear that the Best Buy Plaintiffs had to prove that each of the six entities—(1) Best Buy Co., Inc.; (2) Best Buy Purchasing LLC; (3) Best Buy Enterprise Services, Inc.; (4) Best Buy Stores, L.P.; (5) Bestbuy.com, LLC; and (6) Magnolia Hi-Fi, Inc.—suffered individualized injury and damages. *See Hasbrouck*, 842 F.2d at 1045; *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252-53 (D.C. Cir. 2013) (vacating class certification because the plaintiffs' expert model was defective and did not reliably demonstrate that "all class members were in fact injured by the alleged conspiracy"); *In re Toyota Motor Corp. Unintended Acceleration, Marketing, Sales Practices, and Prods. Liability Litig.*, 826 F. Supp. 2d 1180, 1188 (C.D. Cal. 2011) ("[E]ach Plaintiff must allege his or her own injury in fact." (citing *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975)); *Am. Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1041-42 (N.D. Cal. 2001) (granting summary judgment to the defendant on plaintiffs' claims for Section 4 damages where the plaintiffs' expert relied on a model that failed to show that the defendants "caused actual injury to the individual plaintiffs"); *O'Connell v. Citrus Bowl, Inc.*, 99 F.R.D. 117, 123 (E.D.N.Y. 1983) (Under Section 4, even if "injury in fact has been demonstrated each class member would be required to adduce proof of a quantum of damages on an individual basis." (citing *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981)). By failing to distinguish between any of the six

Best Buy Plaintiffs throughout trial, and particularly with regard to the estimation of damages, the jury was precluded from properly finding that each of the six of them suffered individual injury.

Nevertheless, the Best Buy Plaintiffs attempt to rely on the generalized testimony of a single witness—Wendy Fritz—who only testified as to the aggregate value of the TFT-LCD finished products purchased by all six Best Buy entities from all companies, without clarifying whether those sellers also made TFT-LCD panels, or even participated in the panels conspiracy. Response Br. 40. While Ms. Fritz's testimony may have been "extensive" in the sense that she discussed "purchasing policies," "gross margin requirements," "pricing policies," and "other damages-related facts," *id.*, she offered nothing to help the jury determine what, if any, individual and specific injuries were suffered by each of the six Best Buy entities. And while their experts testified regarding "Best Buy's" maintenance of "one large database containing millions of records of all products purchased by all of Best Buy's entities" Response Br. 41-42 (citing SER 71-73), they did not present any evidence to the jury about the breakdown of the aggregate data among the six of them.

Indeed, the court in *Drug Mart Pharmaceutical Corporation v. American Home Products Corporation*, 472 F. Supp. 2d 385 (E.D.N.Y. 2007) rejected a similar approach in granting summary judgment on an antitrust damages claim

brought by independent retail pharmacies alleging that drug manufacturers engaged in unlawful price discrimination on brand name prescription drugs. The court granted summary judgment to defendants in part because the plaintiffs failed to "proffer evidence that *specific* plaintiff pharmacies lost sales of [brand name drugs] . . . to any specific favored purchaser." *Id.* at 429 (emphasis added). Given the plaintiffs' "burden . . . to demonstrate that they individually suffered damages," evidence of industry-wide lost sales, which were averaged to provide a "generalized damages figure for each individual plaintiff" failed to establish individual damages. *Id.* The court explained: "The application of a general damages calculation representing harm to a class of individuals or entities, and then attempting to apply that same calculation to a specific individual or institution, offends the rule requiring an individualized damages determination." *Id.* As in *Drug Mart Pharmaceutical*, the Best Buy Plaintiffs' evidence was insufficient to establish, with requisite specificity, the individualized damages required to establish standing or to recover under Section 4 of the Clayton Act.

Corporations wield the legal independence of subsidiaries as a powerful shield, routinely insisting in litigation that corporate distinctions cannot be disregarded unless extremely stringent veil-piercing requirements have been met. The Best Buy Plaintiffs cannot be heard to suggest that those distinctions should be ignored when it is convenient for the parent corporation to pretend that any

damages suffered were suffered collectively by "the family." The Supreme Court has rejected, in a far more sympathetic context, efforts to ease proof problems by effectively averaging harm across members of a class of real human beings. *See Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (disapproving this Court's "novel project" of determining classwide liability through trials of purportedly representative samples of class claims). Ultimately, the Best Buy Plaintiffs do not point to any evidence presented at trial regarding the individual injuries allegedly suffered by each of the six Best Buy entities, or whether those individual injuries even flowed from, or were caused by, the TFT-LCD panels conspiracy. *See* Response Br. 42-43. And contrary to their contention, it is of no consequence that HannStar did not provide evidence to counter the Best Buy Plaintiffs' one-size-fits-all approach to injury or damages, for the burden rests with the *plaintiff* to prove injury-in-fact "'with the manner and degree of evidence required at [each] successive stage[] of the litigation.'" *Candaele*, 630 F.3d at 785 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). The Best Buy Plaintiffs did not prove the individualized injury-in-fact or damages as to each of the six Best Buy entities. The judgment must be reversed.

RESPONSE TO THE BEST BUY PLAINTIFFS' CROSS-APPEAL

I. The District Court Did Not Err In Permitting HannStar To Present A Pass-On Defense To The Best Buy Plaintiffs' Indirect-Purchaser Claims Under Minnesota Law

The district court did not err in granting partial summary judgment to HannStar to allow it to present a downstream pass-on defense at trial to the Best Buy Plaintiffs' indirect purchaser claims under Minnesota law. In interpreting state law, a federal court is "bound by decisions of the state's highest court. In the absence of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Trishan Air*, 635 F.3d at 427 (citations and internal quotation marks omitted). A district court's interpretation of state law is reviewed *de novo*. *Id.* at 426-47.

Here, the district court engaged in a thorough and well-reasoned analysis underlying its interpretation of the Minnesota Antitrust Act as providing for a pass-on defense. Contrary to the Best Buy Plaintiffs' contention, the district court did not merely ignore the Minnesota Supreme Court's decisions in *Lorix v. Crompton Corp.* and *State by Humphrey v. Philip Morris Inc.*. Rather, the court carefully analyzed the holdings in each case, along with the text of the Minnesota Antitrust Act, to properly conclude that HannStar could pursue a pass-on defense to the Best Buy Plaintiffs' indirect purchaser claims. The Supreme Court observed in *Illinois*

Brick that permitting such recovery would be inconsistent with ancient and unquestioned principles barring duplicative damages, and damages in the absence of actual harm. 431 U.S. at 730-31. It barred indirect purchaser claims under federal law precisely because the only way to avoid that (essentially unthinkable) result would require apportionment of damages between direct and indirect purchasers—a game that, the Court thought, was not worth the candle. Plaintiffs offer absolutely no reason to think that Minnesota law would break with decades-old precedent to provide a remedy in the absence of harm, and that would duplicate damages recoverable by the party who was actually injured. To the contrary, Minnesota law is clear that courts should *avoid* duplicative recovery whenever possible.

A. A Plain Reading Of The Minnesota Antitrust Act Does Not Prohibit A Pass-On Defense

Contrary to what the Best Buy Plaintiffs assert, the Minnesota Antitrust Act, by its plain terms, clearly permits a defendant to present a pass-on defense in refuting proof of damages. In advocating an absurd interpretation of the statute, the Best Buy Plaintiffs rely on a purely literal reading of the first clause of the following provision: "In any subsequent action arising from the same conduct, the court may take steps necessary to avoid duplicative recovery against a defendant." Minn. Stat. § 325D.57; *see also* Response Br. 50. The Best Buy Plaintiffs contend the reference to avoiding duplicative recoveries in a "subsequent action"

necessarily means that no pass-on defense is allowable, because otherwise the plaintiff in the preceding action would not recover any damages. *See* Response Br. 51. This tortured interpretation not only presupposes that an intermediary always passes on 100 percent of an overcharge, but also flies in the face of a much simpler, self-evident interpretation.

Read in its entirety, this provision in the Minnesota Antitrust Act instructs courts to account for the allocation of damages between an immediate direct purchaser and subsequent downstream purchasers, in order to avoid "duplicative recovery against a defendant." Minn. Stat. § 325D.57. This is necessary because the Minnesota Antitrust Act, as an *Illinois Brick* repealer statute, allows both direct *and* indirect purchaser plaintiffs to seek antitrust damages. *See Lorix*, 736 N.W.2d at 634. Absent consideration of what proportion of an overcharge is borne by a direct purchaser and what is passed onto a downstream plaintiff, defendants subject to direct and indirect purchaser claims under Minnesota law would face the risk of duplicative recovery—a result that the statute expressly instructs courts to avoid. *See* Minn. Stat. § 325D.57. The ability to present a pass-on defense therefore is crucial to protecting against duplicative recovery, a directive expressly set forth in the Minnesota Antitrust Act.

This is the only reasonable interpretation of the Minnesota Antitrust Act, and the district court properly reached it. Indeed, in *Lorix*, the Minnesota Supreme

Court reiterated that the 1984 amendment to the Minnesota Antitrust Act "was intended to restore Minnesota antitrust law to its pre-*Illinois Brick* contours" by reestablishing standing for indirect purchaser plaintiffs to seek damages. *Id.* at 634. *Lorix* gave *Alaska v. Standard Oil Company of California* (*In re Western Liquid Asphalt Cases*), 487 F.2d 191 (9th Cir. 1973) as one example of pre-*Illinois Brick* law that the amendment to the Minnesota Antitrust Act was intended to re-establish. *Lorix*, 736 N.W.2d at 634. In *Western Liquid*, this Court explained: "[I]n passing-on cases, the intermediary should recover the amount of the overcharge that was not passed on, if the proof shows that the ultimate consumers did not pay it all, and any lost profits resulting from increased costs. The ultimate purchasers should obtain the remainder of the overcharge, and any other damages proximately caused." *In re W. Liquid Asphalt Cases*, 487 F.2d at 201.

In restoring Minnesota antitrust law to "pre-*Illinois Brick* contours," the legislature necessarily contemplated that an intermediary plaintiff could only recover damages that are not passed on to a downstream purchaser. *Lorix*, 736 N.W.2d at 634. Permitting a pass-on defense is consistent with this legislative intent, and the express words of the Minnesota Antitrust Act. The district court recognized as much in granting partial summary judgment to HannStar to present a pass through defense at trial. SER 33. This was not error and reversal on this ground is not warranted.

B. Neither *Lorix* Nor *Philip Morris* Held That The Minnesota Antitrust Act Prohibits A Pass-On Defense To Indirect Purchaser Claims

The district court also properly concluded the Minnesota Supreme Court did not hold, in *Philip Morris* or *Lorix*, that the Minnesota Antitrust Act precludes pass-on defenses against damages claims brought by indirect purchasers. In *Philip Morris*, the issue was whether an antitrust plaintiff, who might have passed on damages to a downstream party, could be denied standing to even assert a claim under the Minnesota Antitrust Act. There, a group of health insurance carriers brought antitrust claims under the Minnesota Antitrust Act against numerous tobacco companies, alleging that they illegally conspired to suppress research on the deleterious effects of smoking and to manipulate nicotine levels in cigarettes to spur nicotine addiction in smokers. *Philip Morris*, 551 N.W.2d at 492. The health insurance carriers sought damages for overcharges stemming from this anticompetitive activity on the healthcare services they purchased from providers. *Id.* The tobacco companies maintained, in relevant part, that the insurance carriers lacked standing to bring their antitrust action because any increased costs of the additional medical care stemming from the conspiracy were merely passed on to insurance subscribers. *Id.* at 496.

The Minnesota Supreme Court rejected this argument, noting that after the Supreme Court's decision in *Illinois Brick*, "Minnesota acted to change its law to

allow anyone to sue in antitrust." *Id.* at 497 (citing Act of April 24, 1984 ch. 458, s1, 1984 Minn. Laws 228). The court then explained that "it was the intent of the Minnesota legislature to abolish the availability of the pass through defense by specific grants of *standing* within statutes designed to protect Minnesota citizens from sharp commercial practices." *Id.* (emphasis added).

All this language amounts to is a recognition that a pass-on defense cannot be asserted to deny a plaintiff standing to bring an antitrust claim, because the Minnesota Antitrust Act expressly confers standing upon both direct and indirect purchasers to seek antitrust damages. Contrary to what the Best Buy Plaintiffs propose, this language cannot be read as holding (or interpreting) the Minnesota Antitrust Act to preclude a pass-on defense in response to evidence of the actual damages purportedly suffered by a plaintiff, which is an issue of proof, and not a threshold issue of whether a plaintiff has standing to even bring an antitrust claim for damages.

The district court read this language properly in context, and recognized that *Philip Morris* dealt specifically with the threshold inquiry of standing to bring a claim for antitrust damages under Minnesota law and not issues of proof regarding the magnitude of damages actually suffered by the plaintiff. The district court thus properly concluded that *Philip Morris* "did not address the question of 'pass-on' in

determining damages," but rather whether the plaintiffs had standing to assert a cause of action under the Minnesota Antitrust Act. SER 32-33.

Similarly, the Minnesota Supreme Court in *Lorix* said nothing about whether the Minnesota Antitrust Act precludes a defendant from asserting a pass-on defense to counter proof of actual damages presented at trial by an antitrust plaintiff. Like *Philip Morris*, *Lorix* is an antitrust standing case. There, the Minnesota Supreme Court held that a putative class of rubber tire consumers had standing to assert a damages claim under the Minnesota Antitrust Act against manufacturers of rubber-processing chemicals for overcharges on tires due to an alleged price-fixing conspiracy involving the rubber chemicals used in tires. *Lorix*, 736 N.W.2d at 622. In reaching this holding, the Minnesota Supreme Court held that the federal antitrust standing requirements under the U.S. Supreme Court's decision in *AGC* did not apply to claims brought under Minnesota's antitrust law, precisely because its "application . . . in Minnesota would contravene the plain language of the [Minnesota Antitrust Act] and in some cases thwart the intent of the legislature by barring indirect purchaser suits." *Id.* at 629.

The high court's explanation regarding the inability of Minnesota courts to "ameliorate the risk of duplicative recovery" was not recognition that the Minnesota Antitrust Act precludes a defendant from asserting a pass-on defense to counter a plaintiffs' proof of antitrust damages. Rather, it was an acknowledgment

that the incongruence between federal and Minnesota antitrust law—the former denying standing to indirect purchaser plaintiffs to recover antitrust damages, and the latter affording both direct and indirect purchasers standing to seek damages—creates the potential for a party seeking damages under both federal and Minnesota antitrust law to achieve double recovery. *Id.* at 628. As the court explained: "To the extent that our courts cannot ameliorate the risk of duplicative recovery, as where parallel proceedings in federal courts or courts in other states may result in later awards based on the same injuries, this risk is inherent in the dual system of private antitrust enforcement [under federal and state law]." *Id.* Further, the court in *Lorix* explicitly addressed the distinction between an indirect purchaser plaintiff's standing to seek antitrust damages under Minnesota law and the burden of proving that a plaintiff actually suffered those damages: "Our decision does not mean that Lorix will recover . . . . It is entirely possible that she cannot *prove* her damages[.]" *Id.* at 635 (emphasis added).

This critical distinction between standing to seek damages and the burden of proving those damages must be accounted for when reading both *Lorix* and *Philip Morris*. The district court recognized as much, and properly concluded that *neither* of these two cases held that the Minnesota Antitrust Act denies defendants a pass-on defense in opposing an indirect plaintiffs' attempt to prove damages.

C. Any Misinterpretation Of The Minnesota Antitrust Act Was Harmless Given That The Best Buy Plaintiffs Failed To Satisfy The Requirements Of The FTAIA

The substance of the Best Buy Plaintiffs' cross-appeal is ultimately inconsequential given their failure to satisfy the requirements of the FTAIA. Even if the district court misinterpreted the Minnesota Antitrust Act in allowing HannStar to pursue a pass-on defense in the issue of indirect purchaser damages, that error would be harmless given that the FTAIA presents an independent bar to recovery. *See Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1219 (9th Cir. 1980) (concluding that an entry of summary judgment for defendants on a different ground amounted to harmless error given that, "as a matter of law appellants had no valid claim").

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

Dated: May 4, 2015

Respectfully submitted,

s/ Belinda S Lee

Yi-Chin Ho
LATHAM & WATKINS LLP
355 South Grand Avenue
Los Angeles, CA 90017
Tel: (213) 485-1234
Fax: (213) 891-8763

Belinda S Lee
Aaron T. Chiu
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111
Tel: (415) 391-0600
Fax: (415) 395-8095

J. Scott Ballenger
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, D.C. 20004
Tel: (202) 637-2200
Fax: (202) 637-2201

Attorneys for Defendant-Appellant-Cross-Appellee HannStar Display Corporation

Form 6. Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ this brief contains 13,934 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☒ this brief has been prepared in a proportionally spaced typeface using *(state name and version of word processing program)* Microsoft Word 2010 *(state font size and name of type style)* Times New Roman 14 point, *or*

☐ this brief has been prepared in a monospaced spaced typeface using *(state name and version of word processing program)* _____ with *(state number of characters per inch and name of type style)*

_____.

Signature s/ Belinda S Lee

Attorney for HannStar Display Corporation

Date May 4, 2015

9th Circuit Case Number(s) 13-17408, 13-17618

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) May 4, 2015 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/Belinda S Lee

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)